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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

COE D. BARNARD,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING.

ALFRED S. BENNETT,
Attorney for Plaintiff in Error.

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Now comes the defendant in the above entitled cause by Alfred S. Bennett, his attorney, and respectfully petitions the Court for a re-

hearing of the above entitled cause, and as grounds therefor presents the following:

In relation to the last point presented to and decided by the Court in this cause, to-wit: "The question of error in permitting the learned district attorney to cross examine the witness Stewart"—a witness as to the general reputation of the defendant only, as to specific acts of alleged ill doing, claimed to be within the knowledge of the witness, it appears to us that this honorable court has clearly overlooked the state of the record.

The Court says in its opinion, "If the admission of this evidence was error, it was clearly without prejudice *as it was not contradicted in any particular.* So far as the evidence submitted to the jury was concerned *it stood as a truthful statement*, and therefore without any prejudicial effect upon the jury."

Now while the status of the case in this regard is not, it is true, very fully presented by the record, yet we think that it does not at all sustain the conclusion of fact reached by the Court.

In the first place the evidence *is not all presented by the record, and does not purport to be*, and therefore in order to reach a conclusion that the cross examination of this witness as to Barnard's homestead proof before him was not contradicted and did not contradict or tend to dis-

credit his statement on the direct examination that the general reputation of the defendant for truth and veracity was good, it can only be sustained by a *presumption*.

Such a presumption can only be sustained by over-ruling or refusing to follow the decisions cited by plaintiff on page 24 and 25 of his reply brief, which directly hold that where *there is error*, no presumption whatever can be indulged that it was not prejudicial, and if it is claimed that by reason of evidence or lack of evidence, the error was without injury, that fact must be made to appear in the record by the respondent, or otherwise the presumption will be that the error *did work an injury*.

As two of the decisions cited are decisions of the Supreme Court of the United States and are directly in point, and which have never been modified, or over-ruled it seems impossible to me that the court has intentionally refused to follow them, and I infer therefore that the application of the principle in this case has been overlooked.

In addition to these authorities I call the attention of the honorable court to the case of Miller vs. Territory of Oklahoma, 149 Fed. 339

in which the Circuit Court of Appeals for the 8th Circuit in a decision as late as Dec. 13, 1906, re-affirms the doctrine and says:

"The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should some times be placed, instead of imputing the reversal of convictions by the appellate courts to what is popularly termed 'mere technicalities.' The zeal, unrestrained by barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the sterotyped argument that it is not apparent it in anywise influenced the minds of the jury. The reply the law makes to such suggestions is: *that after injecting it into the case to influence the jury, the prosecutor ought not be heard to say, after he has secured a conviction, it was harmless.* As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that *whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.*"

Here the language of the learned court cited above is especially pertinent as in this case the attorneys for the defendant protested earnestly and repeatedly at the trial against the introduction of this incompetent testimony and again and again objected, both at the times the questions were asked, and again by motions to strike out.

Ought the district attorney in justice and fairness, after presistently presenting this testimony to the jury and taking repeated rulings of the court thereon, to say that the testimony, which he was claiming would prove falsehood on the part of the defendant and discredit the character witness, would not probably have that effect on the mind of the jury, and therefore was not prejudicial.

Besides the record shows, both by the statement of the district attorney itself and even from the mouth of the court, that there was testimony tending to show that the statements made before the witness in the defendant's final proof were false.

In the final proof offered as a part of the cross examination of this witness it appeared that Barnard had sworn that he had resided on his homestead claim, Mr. Bristol on the motion to strike out (printed record page 183), says:

> That this proof was "on a place that he, at that time was proving up on, *there being evidence already in the record offered by the defendant's witness* in that same connection that the family, including the defendant Barnard, had never lived anywhere else than upon the home place of Barnard on Butte Creek, during the entire period." (which home place of Barnard's was an entirely different place than his homestead).

Again the Court in its instructions to the jury, said:

"You will remember also that today the United States Commissioner testified as to the reputation of the defendant as to truth and veracity in the community in which he lived. Upon cross examination there was a proof which had been made by the defendant upon certain land *other than that upon which it is contended he made his home for a long time.* The application of this is limited to the question of the credibility of the witness Stewart in his testimony which he gave as to the reputation of the defendant, that is it is offered for the purpose *of affecting the credibility of the statement made by the witness Stewart.*"

We assume that these statements in the record were overlooked by this honorable court for with them in mind we cannot believe that this court would indulge in a presumption "that there was no contradictory evidence in the records, or that the defendant was not prejudiced by the introduction of this testimony, especially in view of the decisions of the Supreme Court of the United States cited above, that no such presumptions can be indulged in.

It is perfectly plain in this case that there *was such contradictory evidence*, or at least that there was evidence which both the learnerd district attorney and the honorable court believed to be contradictory and upon which the jury may have so found.

We submit therefore that this phase of the case is entitled to re-consideration at the hands of this honorable court.

Upon the main question of *this being error*, we think there can be no dispute and there seems no necessity of adding anything further than the presentation of the matter upon pages 45 to 49 of plaintiff in error's main brief, and page 18 to 22 of the reply brief.

However much we may feel aggrieved at the decision of this honorable court upon the other questions involved they have been squarely passed upon and there is nothing further to say, and thereon we can only bow to the decision of the court. But as to this question, the conclusion of the court seems to rest so entirely upon a mistake of fact as to the condition of the record that we respectfully ask for a re-hearing.

ALFRED S. BENNETT,
Attorney for Plaintiff in Error.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON. } ss.

I, A. S. Bennett, an attorney of the above entitled Court, do hereby certify that in my judgment the above petition for rehearing is well founded and that the same is not interposed for delay.

Dated this 28th day of May, 1908.

ALFRED S. BENNETT.